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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

MICHAEL T. CRANE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Kansas

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Mr. Crane was charged in January 1993 with lewd and lascivious behavior for exposing himself to a woman and, in a separate incident occurring about 30 minutes later, with kidnapping, attempted aggravated criminal sodomy and attempted rape. All four charges were consolidated for trial. Prior to trial, Mr. Crane raised the possibility of an insanity defense. He was transported to Kansas' State Security Hospital in Larned, Kansas for a M'Naghten examination. Mr. Crane raised the issue that he was under the effect of a disassociative disorder "black out" at the time of the offense.

At Larned State Security Hospital, he was examined by Robert Huerter, a licensed master's level psychologist, and Douglas Hippe, a licensed psychologist. J.A. 27, 105. The purpose of the examination was to determine if Mr. Crane was experiencing some type of defect of reason due to a disease of his mind that would have rendered him unable to differentiate between right and wrong, or, if he could differentiate between right and wrong, to be unable to assess the nature and quality of his behavior. J.A. 25. Huerter, in addition to reviewing prior psychological records, police reports and other pertinent documentation on Mr. Crane, administered a Minnesota Multiphasic Personality Inventory, a Millon Clinical Multiaxial Inventory, a Bender Adult Intelligence Test, a memory for design tests, and a Weschler Adult Intelligence Test. J.A. 26, 28. Huerter's diagnosis was that Mr. Crane was not suffering from a disassociative disorder "black out" at the time of the offenses. J.A. 32. Heurter also stated Mr. Crane did not suffer from any type of mental disorder that would have affected his ability to

understand what he was doing. J.A. 33. Both Huerter and Hippe testified that they determined Mr. Crane had an antisocial personality disorder. J.A. 34, 110.

Mr. Crane was determined not to have suffered a disassociative disorder "black out" that would have absolved him of criminal responsibility under M'Naghten. Huerter opined Mr. Crane was simply malingering in an attempt to avoid criminal prosecution. J.A. 29-32. He was returned to the district court where he stood trial and was convicted of all four counts. He was given a sentence of 35 years-to-life. On appeal, the Kansas Supreme Court reversed his felony convictions finding the evidence did not support the crime of kidnapping and that the complaint upon which he stood trial did not vest the court with jurisdiction over the attempted sodomy and rape charges. *State v. Crane*, 260 Kan. 208, 918 P.2d 1256 (1996).

Mr. Crane was returned to the district court where Kansas re-filed the attempted rape and attempted aggravated sodomy charges. At this point, Mr. Crane had been incarcerated for approximately four and one-half years. Mr. Crane challenged the re-filing of the charges as a violation of Kansas' compulsory joinder provision of double jeopardy. His motion to dismiss the charges was denied by the trial court. Mr. Crane then entered into plea negotiations with Kansas. Eventually, an agreement was reached whereby Kansas would amend the charges against him to one count of Aggravated Sexual Battery. Mr. Crane was to plead guilty to this charge. The maximum sentence permitted by law was 3-to-10 years. Under the then existing Kansas statutes, Mr. Crane would be paroled within a few months of returning to prison. In

August 1997, Mr. Crane entered a plea to the amended complaint, was sentenced to 3-to-10 years, and was returned to prison. What Mr. Crane did not know was that Kansas entered into plea negotiations in order to ensure a conviction of a requisite "sexually violent offense" for it had already determined it would use the Kansas Sexually Violent Predator Act (Act) to "keep him off the streets." (Trial Tr., Vol. I, 262-274)

In January 1998, upon being released on parole, Mr. Crane was taken into custody and lodged in the county jail on Kansas' petition to have him declared a sexually violent predator. After a probable cause hearing, he was returned in February 1998 to Larned State Hospital for a "sexual predator evaluation". There, he was examined by Dr. Leonardo Mabugat, M.D. and Ken Eaves, a licensed master's level psychologist. In March, 1998, they issued their "Report to Court of Evaluation". J.A. 11-20. Their diagnosis was that Mr. Crane suffers from exhibitionism and antisocial personality disorder and that he meets the definition of a sexual predator as that term is defined in the Act. J.A. 19-20.

Mr. Crane filed a pretrial motion seeking summary judgment on the basis that Kansas' expert witnesses would not testify Mr. Crane's disorders rendered him unable to control his behavior. He relied upon *Kansas v. Hendricks*, 521 U.S. 346 (1997) as support for his motion. (Pet. for Cert. 23a) The trial court denied his motion. (Pet. for Cert. 23a)

During his sexual predator trial, Mr. Crane cross-examined both of Kansas' expert witnesses that performed the sexual predator evaluation at Larned State

Hospital. Dr. Mabugat testified that Mr. Crane suffered no disorder that renders him unable to control his behavior. J.A. 56-57, 70. Ken Eaves testified that while Mr. Crane's antisocial personality disorder does have some effect upon Mr. Crane's ability to control his behavior, it does not impair it to the degree he is unable to control his behavior. J.A. 99.

At trial, Kansas called two other expert witnesses – Robert Huerter and Douglas Hippe. Neither offered an opinion on whether Mr. Crane's disorders have any impact upon his volitional control. At the conclusion of the State's evidence, Mr. Crane moved for a directed verdict on the basis Kansas had not proven Mr. Crane's volitional control was impaired to the degree he was unable to control his behavior. The trial court denied his motion. (Trial Tr., August 12 and 13, 1998, 103-104)

Mr. Crane sought a jury instruction requiring the jury to decide whether either of his diagnosed disorders had the effect upon his volitional control as to render him unable to control his behavior. J.A. 138-150. Kansas objected to such an instruction arguing the jury need only be required, pursuant to the language of the Act, to determine if: (1) Mr. Crane had been convicted of Aggravated Sexual Battery; and, (2) he suffers from a mental abnormality or personality disorder which makes him likely to engage in future predatory acts of sexual violence, if not confined in a secure facility. J.A. 140, 156. In its argument, Kansas asserted that this Court upheld the Act as a whole and that no such qualifying language exists regarding personality disorders. J.A. 140. Kansas further argued that even if an "unable to control" standard was required, *Hendricks* only required it of "mental abnormalities" – not

"personality disorders". J.A. 140-141. The trial court agreed with Kansas and refused to give Mr. Crane's requested jury instruction. J.A. 142. The trial court made a specific finding that while volitional control is an applicable concept for persons suffering a mental abnormality, it is inapplicable to those with personality disorders. J.A. 143. The jury returned a verdict finding Mr. Crane had been convicted of aggravated sexual battery and that he has disorders that make it more probable than not that he will re-offend unless confined in a secure facility. Mr. Crane was then delivered to Larned State Security Hospital for care and treatment.

Mr. Crane appealed several issues to the Kansas Supreme Court including the trial court's denial to give a jury instruction on volitional impairment. Kansas argued that the Act as a whole was upheld by this Court in *Hendricks* and, therefore, Kansas need only prove those elements set out on the face of the Act, to wit: (1) the person has been convicted of, or charged with, a sexually violent offense; and (2) the person has a mental abnormality or personality disorder that makes him likely to commit future acts of sexual violence unless confined in a secure facility. Kansas argued that proof of an "unable to control" standard was inapplicable to "personality disorders'. In a unanimous decision, the Kansas Supreme Court rejected Kansas' arguments and held that due process required Kansas to prove the one constitutionally sufficient mental disability applicable to Mr. Crane – his mental disability so impairs his volitional control he is unable to control his dangerous sexual behavior. The Court also held that the trial court erred in refusing to so instruct the jury. *In re Care and Treatment of Crane*, 269

Kan. 578, 586, 7 P.3d 285 (2000). The Kansas Supreme Court remanded the case back to the district court for a new trial. *Id.* at 586.

SUMMARY OF ARGUMENT

Kansas v. Hendricks, 521 U.S. 346 (1997), did not create a new substantive due process standard for the commitment of the mentally ill. Instead, this Court carefully and narrowly followed cases such as *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), in which the involuntary civil commitment statute required proof the individual had lost the ability to control his behavior. Noting that the Kansas Sexually Violent Predator Act (Act) sets forth similar criteria regarding volitional impairment, and that Hendricks himself admitted he was unable to control his dangerous sexual behavior, this Court found the Act's definition of Hendricks' mental disorder to be sufficiently precise and upheld its constitutionality in the face of a due process challenge.

Mr. Crane argued his personality disorder must likewise be shown to impair his volitional control to the degree he cannot control his dangerous behavior. Kansas disagreed, arguing successfully to the trial court that it need prove only the language of the Act, i.e., that: (1) Mr. Crane was convicted of aggravated sexual battery; and (2) Mr. Crane suffered from a personality disorder which made him likely to re-offend if not confined in a secure facility.

A unanimous Kansas Supreme Court rejected Kansas' argument and held that the disorder – by any name –

must render the individual unable to control his behavior. The Kansas Supreme Court ruled the trial court erred in refusing to so instruct the jury and remanded the case back to the district court for a new trial. *In re Crane*, 269 Kan. at 586.

The "unable to control" standard acknowledged by this Court as the constitutional mandate for the involuntary civil commitment of men who have served a prison sentence for a sexual offense serves to: (1) narrow the scope of the Act to a small group of individuals within the larger group of dangerous sex offenders; (2) conform the Act with other civil commitment statutes that have adhered to an "unable to control" standard; (3) qualify the Act as "civil" rather than "criminal" in nature by not extending its use to those who might be deterred by such confinement; and (4) hamper misuse for purposes of retribution.

By arguing for a degree of mental impairment that constitutes nothing more than a "likelihood" to commit further crimes, Kansas seeks a construction of the Act that will: (1) expand the reach of the Act to the majority of all sex offenders; (2) create a new and diluted due process standard of "likely to offend"; and (3) alter the nature of the Act by introducing deterrence, as well as the potential for retribution, by extending its reach to those who can and do control their behavior.

ARGUMENT

I. "UNABLE TO CONTROL BEHAVIOR" IS A WELL ESTABLISHED FORM OF MENTAL DISABILITY JUSTIFYING INVOLUNTARY CIVIL COMMITMENT

The Due Process Clause of the 14th Amendment imposes "substantive constitutional limitations" on the states' power to invoke civil commitment. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972). The Due Process Clause of the 14th Amendment requires a state seeking to involuntarily commit an individual in a civil proceeding to prove: (1) the person suffers from a mental illness; and, (2) that mental illness causes the person to pose a danger to himself or others. *Addington v. Texas*, 441 U.S. 418, 426 (1979). This Court has upheld civil commitment schemes where the mental impairment is so severe, the person is incapable of caring for himself. *Heller v. Doe*, 509 U.S. 312, 325 (1993); *Youngberg v. Romero*, 457 U.S. 307, 318 (1982). This Court has approved civil commitment schemes in which the impairment is so severe, the person is absolved of criminal responsibility or is incompetent. *Jones v. United States*, 463 U.S. 354, 360 (1983); *Jackson v. Indiana*, 406 U.S. 715, 718 (1972). And this Court has upheld civil commitment schemes for dangerous sex offenders possessing an impairment of comparable severity that renders the person unable to control his dangerous sexual behavior. *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274 (1940); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

There can be no doubt that a person proven to have committed a sex offense possesses a degree of future

dangerousness. *Jones*, 463 U.S. at 364. But commitment based upon dangerousness alone is unconstitutional. *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992). This Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. *Addington*, 441 U.S. at 425. And due process protection in the involuntary civil commitment context, as this Court has preserved it, has required proof of the existence of a mental illness that imparts a severe impairment. In the involuntary civil commitment of newly paroled sex offenders, neither the recognized "inability to care for ones' self" nor "absolution of criminal responsibility" are applicable. Hence, the only applicable severe mental impairment recognized in civil commitment jurisprudence is the impairment that attacks volitional control rendering the person unable to control his behavior.

Kansas argues it should enjoy the police power to forcibly commit an individual upon completion of a prison sentence for a sex offense if he has a disorder which merely predisposes him to offend again. Kansas argues it need only establish a "link" between the disorder and the inclination to offend again. (Pet'r. Br. 17). Kansas made this same argument before this Court in *Hendricks*. *Kansas v. Hendricks*, Transcript of Oral Argument, p.6, 1996 WL 721073 (U.S. Oral Arg.). The *Hendricks* Court, however, disagreed with such a minimalistic interpretation of the "mental illness" prong of due process. Tracing involuntary civil commitment back to our colonial period, this Court held that commitment is proper in, "narrow circumstances for the forcible civil detainment of people who are *unable to control their behavior* and who

thereby pose a danger to the public health and safety." *Hendricks*, 521 U.S. at 357 (emphasis added). An "unable to control behavior" standard was also approved in *Minnesota ex rel Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). In *Pearson*, this Court upheld a civil commitment scheme directed at persons who, "by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire." *Pearson*, 309 U.S. at 273. Thus, this Court observed that an "unable to control behavior" standard justifying due process in the involuntary civil commitment context enjoys a long pedigree.

For the *Hendricks* Court, it was not the bare existence of a disorder that brought the Act within constitutional limits, but rather that the disorder rendered Mr. Hendricks unable to control his dangerous behavior. Because of this legally significant effect, the *Hendricks* Court found the Act to be similar to other civil commitment statutes it had upheld:

> "The pre-commitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness.*" *Id.* at 358. (emphasis added).
>
> "We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional

> factor, such as 'mental illness' or 'mental abnormality'. (citations omitted). These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a *volitional impairment rendering them dangerous beyond their control.*" *Id.* at 358. (emphasis added).
>
> "To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's *inability to control his dangerousness*, the Kansas Act sets forth *comparable criteria* and Hendricks' condition doubtless satisfies those criteria." *Id.* at 360. (emphasis added).
>
> "Hendricks' abnormality does not consist simply of a long course of antisocial behavior, but rather it includes a specific, serious, and highly unusual inability to control his actions. (For example, Hendricks testified that, when he gets 'stressed out', he cannot 'control the urge' to molest children). (citations omitted). The law traditionally has considered this kind of abnormality akin to insanity for purposes of confinement." *Id.*, at 375. (Justice Breyer concurring).

During Mr. Crane's post-*Hendricks* sexual predator trial, Kansas argued against Mr. Crane's request for a jury instruction that would have required the jury to find that his personality disorder impaired his volitional control to the degree he could not control his behavior. J.A. 140-141. Kansas argued to the trial court, as it had before this Court in *Hendricks*, that it need only prove the existence of a personality disorder and then "link" it to dangerousness. The trial court agreed with Kansas and refused the

jury instruction, finding that volitional impairment rendering the person unable to control his behavior is an inapplicable impairment for those suffering a personality disorder. J.A. 142-143. A unanimous Kansas Supreme Court reversed, holding that the due process protection of the 14th Amendment, as preserved by this Court in *Hendricks*, mandates the government prove not only dangerousness, i.e., likely to offend in the future, but also the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior for, as this Court defined the role mental disorder must play in a constitutionally permissible commitment, the existence of the disorder serves "to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* at 358.

An "unable to control behavior" standard is required if the Act is to remain free of one of the principal objectives of a punitive statute – deterrence. As the *Hendricks* Court concluded in its analysis of whether the Act is punitive in nature, "Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or 'personality disorder' that *prevents them from exercising adequate control over their behavior.*" *Id.* at 362 (emphasis added). Kansas offers no basis for concluding deterrence won't immediately affix to the Act if the reach of the Act is extended to those who can and do exercise control over their behavior.

Mr. Crane was not diagnosed with a disorder that causes him to be unable to care for himself. Nor was he

diagnosed as criminally irresponsible or incompetent. Indeed, prior to his criminal trial in 1993, he was unsuccessful in seeking a defense to criminal responsibility. Under *Pearson* and *Hendricks*, due process required Kansas to prove Mr. Crane was unable to control his behavior. Kansas presented no evidence at Mr. Crane's sexual predator trial, before the Kansas Supreme Court or to this Court to suggest an "unable to control behavior" standard was inapplicable to Mr. Crane or that one of the other two accepted standards should have been proven. Instead, Kansas simply urges involuntary commitment under the Act based upon proof of a prior conviction and a personality disorder that makes Mr. Crane more likely than not to offend again. But proving the effect of a disorder to do no more than incline the person to offend in the future is simply proving the person to be dangerous. While dangerousness is an element to be proven, the distinguishing element that separates persons appropriate for civil commitment from those appropriately dealt with exclusively through the criminal justice system is the effect of the disorder upon the individual's self control. If it has no such effect, the person can only be said to be dangerous and no more. By diluting the severity of the constitutionally mandated "mental illness" to a level consistent with mere "temptation", Kansas would wield a police power with few, if any, limits. Such a power might be used by law enforcement to extend the confinement time of an individual law enforcement felt deserved a longer prison sentence. (see III(3) *infra*). In effect, Kansas seeks an interpretation of the Act that will permit Kansas to involuntarily confine individuals based upon dangerousness alone and commitment based upon

dangerousness alone is clearly unconstitutional. *Foucha*, 504 U.S. at 77-78.

II. THE KANSAS SUPREME COURT CORRECTLY APPLIED *HENDRICKS* TO MR. CRANE'S CASE

Kansas is incorrect in its statement that the *Crane* decision by the Kansas Supreme Court was "nonsensical". The Kansas Supreme Court was careful to follow this Court's narrow ruling applicable to those who were first criminally prosecuted by Kansas and then, upon release from prison, subjected to further confinement for care and treatment. The Kansas Supreme Court found these clear, unambiguous passages of *Hendricks* compelling:

> "Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are *unable to control their dangerousness.*" *Hendricks*, 521 U.S. at 357. (emphasis added).

"We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'. (citations omitted) These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a *volitional impairment rendering them dangerous beyond their control.*" *Id.* at 358. (emphasis added).

"The Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a

'mental abnormality' or 'personality disorder' that makes it *difficult, if not impossible for the person to control his dangerous behavior.*" *Id.* at 358. (emphasis added).

"The pre-commitment requirement of a 'mental abnormality' or 'personality disorder' is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are *unable to control their dangerousness.*" *Id.* at 358. (emphasis added).

"To the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's *inability to control his dangerousness*, the Kansas Act sets forth comparable criteria and Hendricks' condition doubtless satisfies those criteria." *Id.* at 360. (emphasis added).

"Hendricks even conceded that, when he becomes 'stressed out', he *cannot 'control the urge'* to molest children. This admitted *lack of volitional control*, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." *Id.* at 360. (emphasis added).

"Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or 'personality disorder' that *prevents them from exercising adequate control over their behavior*. Such persons are therefore unlikely to be deterred by the threat of confinement." *Id.* at 362 (emphasis added).

> "This requirement again demonstrates that Kansas does not intend an individual committed pursuant to the Act to remain confined any longer than he suffers from a mental abnormality *rendering him unable to control his dangerousness.*" *Id.* at 364. (emphasis added).

A unanimous Kansas Supreme Court rejected Kansas' argument that the "unable to control" standard followed in *Hendricks* applies only to "mental abnormalities" and not to "personality disorders". It rejected Kansas' argument that it need only prove Mr. Crane had a prior conviction and a personality disorder making him likely to re-offend unless locked up in a secure facility. The Court correctly interpreted and applied the *Hendricks* opinion to the fact pattern presented in Mr. Crane's case. While properly deferring to the legislature's authority to choose the terminology describing mental disorders, the Court remained focused upon the legal significance of the effect the disorder must visit upon the individual, rather than the name of the disorder. For Mr. Crane, as with Mr. Hendricks, the Court properly held that the disorder must impair Mr. Crane's volitional capacity to the degree he cannot control his dangerous behavior.

Kansas argues that the Kansas Supreme Court incorrectly read into the Act a requirement that Kansas must prove a volitional impairment of such degree as to render the individual unable to control his behavior. Kansas argues that, "nothing in any of the opinions states, declares or holds that [this Court in *Hendricks*] was adopting a previously unknown substantive due process requirement regarding volitional control." (Pet'r. Br. 18).

Mr. Hendricks was diagnosed with a "mental abnormality" which, as defined in K.S.A. 59-29a02(b) of the Act, is "a congenital or acquired condition affecting the emotional or volitional capacity . . . " (Pet'r. Br. 1a). Mr. Hendricks also conceded at trial he was unable to control his dangerous sexual behavior. *Hendricks*, 521 U.S. at 360. This Court upheld the Act against Hendricks' due process challenge noting that,

> "[T]his admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings. Hendricks' diagnosis as a pedophile, which qualifies as a 'mental abnormality' under the Act, thus plainly suffices for due process purposes." *Id.* at 360.

This Court went on to hold that the Act is consistent with other civil commitment statutes that have been upheld, "[t]o the extent that the civil commitment statutes we have considered set forth criteria relating to an individual's inability to control his dangerousness, the Kansas Act sets forth comparable criteria. . . . " *Id.* at 360.

In arguing the Kansas Supreme Court invented a new substantive due process requirement of impaired volitional control, Kansas ignores the clear, unambiguous language of *Hendricks*. Although Kansas now argues the Kansas Supreme Court incorrectly created the notion of volitional impairment, it argued differently at the trial level. The central theme of Kansas' argument to the trial

court was to acknowledge *Hendricks* requires that a "mental abnormality" must be shown to impair volitional control to the degree the person is unable to control his behavior, but that "personality disorders" are exempt from this Court's decision in *Hendricks*. J.A. 141. The trial court adopted that argument holding that the Act made volitional control applicable to mental abnormalities but not to personality disorders. J.A. 143.

A unanimous Kansas Supreme Court rejected Kansas' argument that *Hendricks* is not applicable if the mental disability is called a "personality disorder" instead of a "mental abnormality". And, contrary to Kansas' assertion (Pet'r. Br. 20) that the Kansas Supreme Court ruled "personality disorders", by definition, can never satisfy substantive due process requirements, the Court remanded the matter back for a new trial in which the jurors are to be instructed they must find Mr. Crane's personality disorder impairs his volitional control to the degree he cannot control his behavior. In reversing the trial court and remanding for a new trial, the Kansas Supreme Court did not create a new substantive due process standard of "unable to control behavior". It simply applied the existing one.

III. AN IMPAIRMENT STANDARD OF "LIKELY TO OFFEND" DOES NOT SATISFY THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

"This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington*, 441 U.S. at 425. "The [standard of proof]

serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Addington*, 441 U.S. at 425 (quoting *Tippet v. Maryland*, 436 F. 2d 1153, 1166 (CA4 1971)).

While the foregoing statements were made in the context of analyzing the burden of proof mandated by the Due Process Clause of the 14th Amendment, the value to be placed on individual liberty is no less in the context of the substantive due process question raised in this appeal.

Our civil commitment jurisprudence reflects the great value our society places on individual freedom. Individuals who are mentally ill but not dangerous may not be forcibly committed. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). Individuals who are dangerous but not mentally ill may not be forcibly committed. *Foucha*, 504 U.S. 77-78. due process mandates a person may not be involuntarily committed absent proof he is both mentally ill and, as a result, dangerous. *Addington*, 441 U.S. at 426-427; *Jones*, 463 U.S. at 363; *Foucha*, 504 U.S. at 75-76. "[T]he Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Foucha*, 504 U.S. at 77-78, quoting *Jones*, 463 U.S. at 368, 370. "[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of a

current mental illness and dangerousness." *Foucha*, 504 U.S. at 78.

> "In *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed.2d 552 (1980), we held that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as mentally ill without appropriate procedures to prove he was mentally ill." *Foucha*, 504 U.S. at 78-79.

Proving a person is "mentally ill" in the civil commitment context has meant proving the person's mental disability: (1) renders him unable to care for himself. *Heller*, 509 U.S. at 325; (2) renders him criminally irresponsible or incompetent. *Jones*, 463 U.S. at 360; or (3) renders him unable to control his behavior. *Pearson*, 309 U.S. 273. Mr. Crane was entitled to no less due process protection for, "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Foucha*, 504 U.S. at 79, quoting *Jackson v. Indiana*, 406 U.S. 715, 724 (1972), quoting *Baxstrom v. Herold*, 383 U.S. 107, 111-112 (1966).

There are three constitutional problems with Kansas' argument that Mr. Crane was properly committed upon a showing that: (a) he was convicted of a sexually violent offense; and (b) he suffers from a personality disorder which makes him likely to offend if not confined. All three problems arise from the constitutionally deficient impairment implicit in the phrase, "makes him likely to offend". The first problem is that such a minimal impairment does not comport with any form of "mental illness" recognized by this Court. The second problem is that the

resultant expansion of the Act to those who can control their behavior produces a civil commitment scheme that is coextensive with the criminal law. The third problem is that removing the historical impediment of proving a legally significant level of impairment, the Act can readily be misused for retribution.

1. "Likely to offend" does not constitute "mental illness"

Historically, the involuntary commitment power of the states has been limited in application to those suffering a severe deterioration in perceptive, cognitive or volitional capacity. *Addington*, 441 U.S. at 412 (psychotic schizophrenia with paranoid tendencies); *O'Connor*, 422 U.S. at 565 (paranoid schizophrenia); *Jones*, 463 U.S. at 359-360 (paranoid schizophrenia); *Foucha*, 504 U.S. at 75 (drug induced psychosis); *Pearson*, 309 U.S. at 273 (utter lack of power to control sexual impulses); *Hendricks*, 521 at 360 (inability to control behavior). As involuntary civil commitment law has evolved in the United States, only three forms of mental impairment have been recognized as satisfying due process: (1) an inability to care for ones self; (2) incompetence or criminal irresponsibility; and (3) an inability to control one's behavior. States are free to choose language defining mental health concepts. *Hendricks*, 521 U.S. at 359. But the legal significance of the impairment visited upon the individual must account for issues such as individual responsibility and competency. *Id.* at 359.

"Likely to offend" does not imply any negative effect upon an individual's ability to care for himself, his criminal responsibility or competency, or an inability to control his behavior. "Likely to offend" is a vague, imprecise term that could be satisfied by a person's decision to continue to offend for purely hedonistic reasons. An individual who receives a large sum of-money for transporting controlled substances, who perceives very little risk of apprehension and has no regard for the harm he causes to others is "likely to continue to offend". Certainly such a person represents a threat to society and if caught should be dealt with through our criminal justice system. But unless he suffers from a mental disorder so severe as to render him unable to care for himself, or criminally incompetent or criminally irresponsible, or unable to control his dangerous behavior, this Court's precedents will not suffice to uphold an involuntary civil commitment to a mental hospital.

2. The Act becomes coextensive with the criminal law

Kansas wants the police power to commit anyone with a disorder who is likely to offend. Such an Act would reach most sex offenders. Dr. Mabugat opined that over 75% of all Kansas prisoners suffer from an antisocial personality disorder. *In re Crane*, 269 Kan. at 585. Assuming sex offenders as a group suffer a like percentage of antisocial personality disorders, 75% of all sex offenders in Kansas prisons, like Mr. Crane, would be subject to involuntary commitment.

Given such a vast reach of the Act, coupled with the provision under K.S.A. 59-29a02(a) authorizing the employment of the Act against persons who have not been convicted but are simply charged with a sexually violent offense, the Act becomes coextensive with the criminal justice system. Such an interpretation of the Act would provide Kansas with the option of proceeding against a defendant in a criminal proceeding in which Kansas must prove beyond a reasonable doubt that the defendant did each element of the criminal offense, or prove beyond a reasonable doubt that he has been charged with a sexually violent offense, he has a disorder and the disorder makes the odds more probable than not that he will offend in the future unless confined. The Act could, and would, be used for punitive purposes. Kansas might feel it would be easier to prove a "more probable than not" case than a "beyond a reasonable doubt" case, or an indefinite sentence might be more appealing to the state than a fixed term.

The Act would also take on a function of deterrence as it would be extended to those who can and do control their criminal behavior. This Court, in analyzing Hendricks' claim that the Act is criminal in nature, observed that the Act does not serve a primary objective of the criminal law – deterrence. This Court noted that because the Act is limited in its use to those who, by definition, cannot control their dangerous behavior, they are unlikely to be deterred by the threat of confinement. *Hendricks*, 521 U.S. at 362-363.

3. Using the Act for retribution

The darkest feature of an Act requiring less than the historical severity of impairment is its amenability to misuse for retribution. Such was the fate for Mr. Crane. His case is the case warned of in the *Hendricks* concurring opinion, "My brief, further comment is to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retrospective application." *Id.* at 371-372. "If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." *Id.* at 373. "We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone." *Id.* at 373.

> "On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.* at 373.

Mr. Crane was sentenced to a 35 years-to-life sentence for kidnapping, attempted rape and attempted aggravated sodomy. On appeal, the Kansas Supreme Court reversed his kidnapping conviction for insufficiency of evidence and his attempted rape and attempted sodomy charges on jurisdictional grounds. *State v. Crane,*

260 Kan. 208, 918 P.2d 1256 (1996). Remanded back to the district court for a new trial on the attempted rape and attempted aggravated sodomy charges, Mr. Crane entered into plea negotiations with Kansas. He agreed to plead guilty to one count of aggravated sexual battery, a felony carrying a maximum sentence of 3-to-10 years. Under Kansas law at that time, a prisoner was released on parole upon completing one half of his maximum sentence. As Mr. Crane had served approximately 4½ years, pleading to aggravated sexual battery meant he would soon be paroled. Unknown to Mr. Crane during plea negotiations was that Kansas had an integrated plan to use the Act in conjunction with the criminal justice system. Step one was to assure a conviction of the requisite "sexually violent" offense. Step two was to then follow with a sexual predator action against him upon his parole. The victim was consulted during the plea negotiations to assure her that allowing Mr. Crane to plead to a 3-to-10 year sentence was just the first step in an integrated program to "keep him off the streets." While incorporating a victim into discussions between parties regarding a civil commitment proceeding might violate confidentiality rules, such incorporation during criminal proceedings is a constitutional requirement in Kansas under the Victims Rights amendment. Clearly, the *mens rea* of Kansas, by confiding in her during the criminal proceedings of its intent to invite a plea in order to follow with the Act, evidenced its motive for using the Act – retribution.

Evidence of Kansas' use of the Act in conjunction with the criminal justice system surfaced during cross-examination of the victim during Mr. Crane's sexual

predator trial. The following excerpts of her testimony appear in Trial Tr., Vol. I, 262-264:

Q. (By Mr. Donham) "I had just asked you a question before Mr. Toth objected, saying that if I understand your testimony, you have testified that at the time you were contacted by the District Attorney's office, they told you that along with entering into this plea negotiation, for him to enter a plea of guilty to aggravated sexual battery, that they would use the Sexual Predator Act against him."

A. (By Ms. Shy) "I believe the context of that was after things were settled, whatever plea or sentence was agreed to, then they would go after him with the Sexual Predator Act to see if we could keep him off the streets."

Q. "That's what they told you when they were telling you about the plea agreement they were working out?"

A. "It was in response to my worries that he was going to get off. Don't worry, you know, because it's not over yet."

. . . . . .

Q. "And they contacted you about the fact that Mr. Crane was working things out with the D.A.'s office to enter a plea in this case. Is that right?"

A. "I probably don't have the same perspective you do as to what was happening, but, yes, I was contacted and informed that there was in fact still more things going on that I needed to be aware of."

Q. "Okay. Those things being that Mr. Crane would be entering a plea?"

A. "Yes."

Q. "And you were upset because you didn't think he was going to serve enough time?"

A. "That's correct."

Q. "But you were told that they would also employ the Sexual Predator Act against him?"

A. "If the outcome wasn't favorable, yeah, they would go after him because he was a repeat offender, and so they were going to go after him to try and keep him off the streets, which is why we were here to begin with."

Kansas, following the above disclosures, engaged the victim in the following colloquy appearing in Trial Tr., Vol. I, 268-270:

Q. (By Mr. Toth) "We're back to square one where we've got to start all over, correct?"

A. "That's correct."

Q. "And we've got to start with less charges than we had back in 1993?"

A. "Yes."

Q. "So did I discuss with you what very few options actually we did have at that point?"

A. "Yes."

Q. "And it was mutually agreed upon between you and I that because the charges that Mr. Crane was facing were so small, that being

what we were left to retry in front of the Court, that we ought to take a conviction on the – that we talked about his conviction, correct?"

A. "Yeah."

Q. "Okay?"

A. "Yes."

Q. "And at that point in time, were you aware that Mr. Crane had almost served out the maximum amount of time that he could serve?"

A. "Yes."

Q. "Okay. And we discussed that there might be a possibility that we could file a predator action, correct?"

A. "Yes. Yes."

Q. "And did I discuss with you that one of the prerequisites of a predator action is one has to be convicted of a sexually violent offense?"

A. "Yes."

Q. "And would you agree that aggravated sexual battery is a sexually violent offense?"

A. "I'll take that. I'm not a lawyer."

Q. "We had some discussions along those lines, right?"

A. "Yes."

Q. "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?"

A. "That's correct."

Q. "And understandably, you're very upset about how the system treated you in this case, right?"

A. "Yes, very."

The victim went on to make additional statements evidencing a clear intent on the part of Kansas to use the Act in a manner warned of in the concurring opinion of *Hendricks* – in conjunction with the criminal justice system to recover confinement time Kansas "understandably" felt cheated out of by "the system".

A. "We did not discuss what using the Sexual Predator Act entailed until later. When we were talking about reaching a plea or some kind of an agreement, it was suggested it was the best way to go in order to be able to go down the line and use that option." (Trial Tr., Vol. I, 272).

A. "To my knowledge, I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the Sexual Predator Act. As I was – as I understood, this was the only option, but if we can get a – some kind of a conviction, then we can use this option later down the road to make sure he stays off the street." (Trial Tr., Vol. I, 274).

Clearly, Kansas sought to recover some, if not all, of the 35 year-to-life prison sentence that it lost on appeal. And it chose the Act as the instrument to restore the confinement time it and the victim believed Mr. Crane deserved. It was able to succeed at the trial level because it was unimpeded by a requirement to prove Mr. Crane's

personality disorder rendered him unable to control his dangerous sexual behavior. His prior conviction and the existence of his personality disorder were not contested. The only remaining element requiring proof was his likelihood to re-offend. As this Court observed in *Jones*, 463 U.S. at 364, "The fact that the accused was found to have committed a criminal act is strong evidence that his continued liberty could imperil the preservation of public peace." And as the experts for Kansas opined, "[the best predictor of future behavior is past behavior]". J.A. 50, 121. Recovering confinement time lost to "the system" via the Act was easily accomplished because Kansas was unimpeded by the necessity to establish the existence of any of the forms of mental disabilities justifying involuntary commitment. Kansas was enabled to use the Act against Mr. Crane for retribution.

CONCLUSION

This Court should affirm the decision of the Kansas Supreme Court. The Due Process Clause of the 14th Amendment places constraints upon the states' police power to involuntarily civilly commit its citizens. There must exist a mental illness and, as a result, the person must be dangerous to self or others. The mental illness accepted in the involuntary civil commitment context is one rendering the person unable to control his dangerous sexual behavior. This Court recognized this constitutional mandate in *Hendricks*. The Kansas Supreme Court recognized it in *In re Crane*. Kansas seeks relief from the constraint of due process in order to exercise a police power over anyone whose disorder simply makes them

more likely than not to offend again. This Court should not vest Kansas with that unbridled police power. If such a power is gained, the civil nature of the Act will evaporate. By reaching those who control their behavior, the Act will assume a deterrent effect. By permitting its use against those who are merely likely to re-offend, there will exist no restraint on its use for retribution. Thus, the Act will achieve the two objectives of a criminal statute – deterrence and retribution. While being criminal in nature, the Act does not extend the full constitutional protections mandated by the criminal law, such as the burden of proof. Hence, extending the reach of the Act beyond those who are unable to control their behavior will convert the Act into an unconstitutional tool in the hands of the State. The Kansas Supreme Court correctly interpreted the *Hendricks* decision to the facts in Mr. Crane's case. The opinion of the Kansas Supreme Court should be affirmed and this Court should reiterate the importance of the "unable to control behavior" standard historically followed in involuntary civil commitment jurisprudence.

Respectfully submitted,

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